



NO. 82-1994

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JOINT APPENDIX

JOE G. ROADY, ESQ.
SHEINFELD, MALEY & KAY
3700 First City Tower
Houston, Texas 77002
(713) 658-8881

Counsel for Petitioner

REX E. LEE, ESQ.
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Counsel for Respondent

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

Petition For Certiorari Filed June 7, 1983

Certiorari Granted October 17, 1983

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* The decisions by the District Court and the United States Court of Appeals for the Fifth Circuit have been printed in the Petition For Writ of Certiorari, Appendices B and A, respectively.

DISTRICT COURT DOCKET ENTRIES

PROCEEDINGS

- 8-21-78 NOTICE OF CONDEMNATION
- 8-21-78 COMPLAINT IN CONDEMNATION
- 8-21-78 ISSUED Notice of Condemnation and handed to U. S. Marshal the following NAMES:
- 9-18-78 Kirby Forest
Industries, Inc. (s/9-11-78) \$3.24
- * * *
- 8-30-78 NOTICE OF LIS PENDENS, a suit was instituted on August 21, 1978.
- 9-21-78 ANSWER OF KIRBY FOREST INDUSTRIES, INC.
- * * *
- 10-30-78 ORDER Setting Matters for Trial and Supplemental Instructions, Jack B. Osborne, Chairman, Condemnation Commission, Original Order in File B-78-589-CA-MF-1525-57. V.89, P.124
- * * *
- 3-03-80 REPORT AND FINDINGS OF THE CONDEMNATION COMMISSION wherein it is the opinion of the Commission that the highest and best use of this land falls into a number of categories. A portion of this land, as above discussed, is best used for the production of timber, a portion is best usable for subdivision/sand pit, a portion

for recreational use, and water front development. The Commission finds that the entire tract of 2,518.57 acres, on the date of taking, was worth \$2,929,702.00. The 342.71 acres in the remainder is worth \$598,500.00 leaving the value of the taking at \$2,311,202.00. Copy to attys. of record 3-6-80 (Signed Jack B. Osborne, Chairman, Land Commission, Smythe Shepherd and John H. Blackwell) V.98, P.238

* * *

7-28-81 MEMORANDUM OPINION—by Judge Robert M. Parker.

8-13-81 JUDGMENT ON THE REPORT AND FINDINGS OF THE CONDEMNATION COMMISSION—It is Ordered that the just compensation for the above tracts is the sum of \$2,331,202.00 plus interest at the rate of six per cent (6%) per annum from August 21, 1981 to the date of deposit. The United States shall deposit in the registry of Court the sum of \$2,331,202.00 together with interest at the rate of six per cent (6%) per annum from August 21, 1978 to the date of deposit. S/8-12-81 RMP Certified copy to attorneys of record.
Vol. 111, Pg. 136

10-08-81 NOTICE OF APPEAL—by Pltff cc U.S. Court of Appeals, Fifth Circuit and attorney of record.

10-09-81 NOTICE OF APPEAL—by Deft Kirby Forest Industries, Inc., certified copy mailed to U.S. Court of Appeals, Fifth Circuit and attorneys of record.

* * *

3-30-82 JUDGMENT—It is Ordered that the Clerk will issue his check, payable to Kirby Forest Industries, Inc., in the amount of \$2,825,508.06 and deliver to Curtis Willie, Director of Administration, Kirby Forest Industries, Inc. That the sum of \$10,000.00 representing escrow funds for disputed taxes claimed to be payable to Jefferson County Tax Collector, City of Beaumont Tax Collector, Beaumont Independent School District, Hardin County Tax Collector, and Lumberton Independent School District Tax Collector, shall remain on deposit in the registry of the Court. The payments herein ordered are subject to adjustments as may be ordered pursuant to appeals now pending in the Circuit Court of Appeals for the Fifth Circuit at New Orleans, La. That Title in and to the estate condemned is this proceeding is vested in the United States of America.
S/3-30-82 RMP Certified copy to attorneys of Record Vol. 115, Pg. 232

* * *

4- 1-82 DISBURSED Per Judgment 3-30-82
\$2,825,508.06 ck #26,472 Kirby Forest Industries, Inc.

* * *

3-26-82 CERTIFICATE OF CLERK—deposited in the registry of the court the sum of \$2,835,-508.06. represented by U.S. Treasury Check No. 178,726, 178,727 and 178,728 dated March 26, 1982.

* * *

2-22-83 ORDER, Fifth Circuit: It is Ordered that the judgment of this Court of January 24, 1983 is hereby amended by striking therefrom the paragraph taxing costs on appeal. Each party will bear their own costs. CC to attys.

3-30-83 JUDGMENT of Fifth Circuit, It is Ordered that the judgment of the District Court in this cause be and is hereby reversed in part and that this cause be and the same is hereby remanded to the District Court in accordance with the opinion of this Court. It is Ordered that defendants-appellees pay Plaintiff-appellant the costs of appeal to be taxed by the Clerk of this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION B-78-598-CA-MF-1525-54

TRACT NOS.: 189-09, 189-15, 189-18,
190-02, 190-05, 191-02, 191-05

(Big Thicket National Preserve)

UNITED STATES OF AMERICA, Plaintiff,

v.

2,175.86 ACRES OF LAND, MORE OR LESS,
SITUATE IN HARDIN AND JEFFERSON
COUNTIES, TEXAS, AND KIRBY FOREST
INDUSTRIES, INC., AND UNKNOWN OWNERS,
Defendants.

(Filed August 21, 1978)

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America for the taking of property, under its power of eminent domain, and for the ascertainment and award of just compensation to the parties in interest.
2. The public uses for which the property is to be taken and the authority for the taking are set forth in Schedule "A" annexed hereto and made a part hereof.
3. The property to be taken, the estate to be taken, and the names and addresses of the persons having or claiming an interest in said property are described in Schedule "B" annexed hereto and made a part hereof.

4. Local and State taxing authorities may have or claim an interest in the property by reason of taxes and assessments due and exigible.

5. There are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to plaintiff, and such persons are made parties to this action under the designation "Unknown Owners."

WHEREFORE, plaintiff demands judgment that the property be condemned, that just compensation for the taking be ascertained and awarded, that such other relief as may be lawful and proper be granted.

JOHN H. HANNAH, JR.
United States Attorney

By: HAL B. CAMERON, JR.
Hal B. Cameron, Jr.
Assistant U. S. Attorney

(Exhibits Omitted in Printing)

NOTICE OF LIS PENDENS

(Title Omitted in Printing)

(Filed August 30, 1978)

TO ALL WHOM IT MAY CONCERN:

NOTICE IS HEREBY GIVEN that on August 21, 1978, a suit was instituted in the above-named Court, which is a condemnation proceeding, in which the above-named plaintiff and defendants are parties, defendants being more particularly named on attachment hereto; that the property involved in said suit is real estate situate in Hardin and Jefferson Counties, Texas, more particularly described on attachment hereto; and that the estate plaintiff seeks to acquire by condemnation is more particularly described on attachment hereto.

DATED at Tyler, Texas, this 24th day of August, 1978.

JOHN H. HANNAH, JR.
United States Attorney

By: /s/ **HAL B. CAMERON, JR.**
Hal B. Cameron, Jr.
Assistant U. S. Attorney

P. O. Box 1049
Tyler, Texas 75701

(Exhibits Omitted in Printing)

NOTICE OF TRIAL SETTING

(Title Omitted in Printing)

(Filed January 15, 1979)

Compensation for the tract(s) in the above numbered matter will be heard by the Commission commencing at 9:00 a.m. on February 13, 1979, in the Magistrate's Courtroom in the Federal Building in Beaumont, Texas.

The parties or their attorneys are directed to submit a Pre-trial Order to me, Jack B. Osborne, Chairman of the Land Commission, 1218 San Jacinto Building, Beaumont, Texas 77701, on January 30, 1979, and to exchange comparable sales information by placing same properly addressed, in the mail on February 2, 1979. Each side is limited to five comparable sales per tract, unless objection to this limitation is made known to the Commissioners at the time of the Pre-trial hearing. If it appears to the Commissioners that in certain instances this limitation would be unreasonable, an exception will be granted. The form for exchanging sales data is as follows:

Grantor:

Grantee:

Date:

Area:

Consideration:

Price Per Acre or Lot:

Instrument:

Recorded:

Survey:

The parties will at the same time provide the names, addresses and qualifications of their respective expert witnesses. Each side is limited to two expert witnesses per tract unless good cause is shown for exceeding this number.

In the event that the Pre-trial Order has been agreed to by both parties and in the event that after examination by the Commission the Pre-trial Order appears to be in proper order, it will not be necessary to have a formal Pre-trial. On the other hand, if agreement is not reached or if the Pre-trial Order received is not acceptable, there will be a Pre-trial on February 5, 1979, at 9:00 a.m. The parties or their attorneys are to have prepared jointly a Pre-trial Order containing the following:

1. Legal description of property acquired and estate taken.
2. The date of taking.
3. A summary of the location of the property and in partial takings, the number of acres in the parent and remainder tract.
4. (a) List of expert witnesses together with their written qualifications.
(b) Names and addresses of any other witnesses, including the defendants who will testify.
5. Lists of the comparable sales information previously exchanged.

/s/ JACK B. OSBORNE

Jack B. Osborne
Chairman, Land Commission

(Notice of Service of Trial Setting Omitted in Printing)

DISTRICT COURT PRE-TRIAL ORDER

(Title Omitted in Printing)

(Filed February 15, 1979)

This is an action in condemnation under the powers of eminent domain and the jurisdiction of the Court is invoked under 28 U.S.C. Section 1358. The jurisdiction of the Court is not disputed.

The matter having been referred by the Court to a Commission, in accordance with the instructions of the Commission as set forth in the Notice of Trial Setting, there are attached hereto the following:

1. Statements of uncontested issue by tract, including
 - a) Legal description and estate taken
 - b) Date of taking
 - c) A summary of the location of the property and in partial takings the number of acres in the parent and remainder tracts.
2. Lists of Expert Witnesses of each party together with their written qualifications.
3. Names and addresses of any other witnesses including the Defendants who will testify.
4. Lists of the comparable sales information previously exchanged.

* * *

vate his land, and, therefore, the neighbor's profit would be less while the fair cash market value of the two neighboring tracts of land might be approximately the same.

(18) You are further instructed that the price paid by the Government, or any other political subdivision with the right to eminent domain, for property similar to that being condemned is inadmissible and is not to be considered for any purpose.

(19) The "date of taking" must be and is fixed as of the date the Government took possession of the land and denied the landowner its use and benefit. In some instances, the Government obtains an order of immediate possession and takes title to the land, but the owner is permitted to continue to use the land until the end of the year, gathering and marketing his crops, etc., but in those instances the value must be fixed at the time the Government took it, and not at the time the property was abandoned by the landowner.

(20) The just compensation is the fair cash market value of the land, or interest therein, taken (whether fee simple title or otherwise). By fair cash market value is meant the amount of cash money the land, or interest therein, taken would bring in the open market at the time of the taking, or the time the Government became definitely committed to the project, when sold by a person desirous and willing to sell, but not obliged to sell for any particular purpose, and bought by a person able to and desirous of buying, but not obliged to buy for any particular purpose, allowing a reasonable time for negotiations, and taking into consideration all of the uses to which it is reasonably adaptable, and for which

it either is or in all reasonable probability would have become available within the reasonably near future, but for the taking by the Government. Just compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his

* * *

(29) Since it would be impossible for any person other than a member of the Commission to determine what evidence was considered and the weight given to the testimony of the witnesses heard, the Commission will make its own determination and findings.

(30) In making your award you will make your findings of fact and such other findings as are necessary to support your findings of just compensation. Your findings should be sufficiently comprehensive and pertinent to the issues to provide a basis for decision and must be supported by evidence. In this connection the Commission should include in its findings, among other things, (a) the highest and best use of the property on the date of taking but before the acquisition by the Government; (b) the highest and best use of the remainder which was owned by the landowner on the date of taking but after the Government acquired its interest; (c) the estates taken by the Government and the acreage contained in the various tracts condemned; (d) the effect upon any remainder, whether it is damaged or enhanced by virtue of the Government's taking, and the weight given to the testimony of the various witnesses with respect to conflicts therein; (e) the approach to evaluations that the

Commission considered most applicable, such as market data, income, or reproduction; (f) the tracts of land considered by the Commission as comparable for the purpose of establishing a market data approach; (g) the fair cash market value of the entire tract on the date of its taking as it existed before the taking; (h) the value of any remainder after the acquisition by the Government, including any damages or increment as the case may be by virtue of the taking and the project; (i) the fair market value of any outstanding interest owned by third persons, such as gravel lease, mineral lease, or grazing lease, etc.; and (j) a description of the location, topography and accessibility of the subject

* * *

TRIAL PROCEEDINGS

(Title Omitted in Printing)

(Filed July 16, 1979)

BE IT REMEMBERED that on the 6th day of March, 1979, before the Land Commission of the United States, in the offices and courtroom of the United States Magistrate, at Beaumont, Texas, the following proceedings were had in the above styled and numbered cause:

APPEARANCES:

REPRESENTING THE LAND COMMISSION:

HON. JACK B. OSBORNE, CHAIRMAN

Attorney at Law
San Jacinto Building
Beaumont, Texas 77701

HON. JOHN BLACKWELL

Corporate Drive
Beaumont, Texas 77706

HON. W. SMYTHE SHEPHERD

720 - 20th Street
Beaumont, Texas 77706

**REPRESENTING THE UNITED STATES
GOVERNMENT:**

HON. HARRY McKEE

Special Assistant to the U. S. Attorney
Jack Brooks Building
Beaumont, Texas 77701

REPRESENTING THE LANDOWNER:

HON. JOYCE COX

Cox, Pakenham & Roady
2500 Two Shell Plaza
Houston, Texas 77002

HON. ROBBIN R. DAWSON

Cox, Pakenham & Roady
2500 Two Shell Plaza
Houston, Texas 77002

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* * *

MR. McKEE: The property—it's my understanding that we are going to be treating all of these tracts of land as one unit for the purposes of this trial.

MR. OSBORNE: That was my understanding, too.

MR. McKEE: The total acreage would be 2,518.57 acres in the before position. The Government is acquiring 2,275.93—excuse me—.86 acres, leaving a remainder of 342.71 acres, and the date of taking will be the date of trial.

MR. OSBORNE: What stipulations do we have? Number one, we're stipulating now, today is the date of taking?

MR. McKEE: Yes, sir.

MR. COX: Yes, sir.

MR. OSBORNE: Okay. We are—There is no problem, is there, with the Government's authority to take?

MR. DAWSON: No, sir.

MR. OSBORNE: Okay. Is there any problem with the power of this Commission to hear this case?

MR. DAWSON: No, sir.

* * *

REPORT AND FINDINGS OF THE
CONDEMNATION COMMISSION

(Title Omitted in Printing)

(Filed March 3, 1980)

*Authority of
Commission:*

- (1) Federal Rule of Civil Procedure 71A, as Amended, and
- (2) Order of Court Appointing Commission, entered September 8, 1977, and October 3, 1977, and
- (3) General Instructions of the Court.

*Date of
Hearing:*

March 6, 7, 8, 9, 19 and 20, 1979.

*Counsel for
Government:*

Harry W. McKee, Special Assistant U. S. Attorney.

*Witnesses for
Government:*

Robert Dobbs Dillman, Expert in Air Photo Interpretation, Houston, Texas.

James K. Norwood, Expert Real Estate Appraiser, Fort Worth, Texas.

F. E. Willcox, Jr., Expert in Soil Mechanics and Engineering.

J. T. Roach, Expert Timber Buyer, Maydelle, Texas.

Defendant

Landowner:

Kirby Forest Industries, Inc.

Counsel for

Landowner:

Joyce Cox, Attorney at Law, Houston, Texas.

Robbin H. Dawson, Attorney at Law, Houston, Texas.

Witnesses for

Landowner:

George Stanley, Senior Vice President, Kirby Forest Industries, Inc.

Thomas Newman, Expert Timber Appraiser, Birmingham, Alabama.

Frank R. Grote, Expert Timber Appraiser, Silsbee, Texas.

Azar B. Bean, Expert Timber Buyer, Kirbyville, Texas.

Glen Dixon, Real Estate Developer, Victoria, Texas.

Willard J. Hall, Expert Real Estate Appraiser, Beaumont, Texas.

Stipulations:

- (1) Date of Taking: March 6, 1979.
- (2) Total Acreage in Tract: 2,518.57 acres. The remainder is 342.71 acres and the part taken is 2,175.86 acres.

- (3) Plaintiff has the authority to take this property.
- (4) This Commission has the authority to hear this matter.
- (5) That Tract 189-09 be resurveyed and remapped so that it runs and meanders with, about 25 feet west of the center line of a road which is marked in red on an exhibit in the north end of the Tract.
- (6) The estate acquired was the fee simple title, however, excepting and excluding from the taking all oil, gas, and other minerals in and under said land.

*Record of
Proceedings:*

A competent reporter was present throughout the hearing and a transcript can be obtained. All exhibits have been filed with the U. S. District Clerk.

• • •

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

CIVIL ACTION B-78-598-CA-MF-1525-54

**TRACT NOS.: 189-09, 189-15, 189-18,
190-02, 190-05, 191-02, 191-05**

(Big Thicket National Preserve)

UNITED STATES OF AMERICA, Plaintiff,

v.

**2,175.86 ACRES OF LAND, MORE OR LESS,
SITUATE IN HARDIN AND JEFFERSON
COUNTIES, TEXAS, AND KIRBY FOREST
INDUSTRIES, INC., AND UNKNOWN OWNERS,
Defendants.**

(Filed August 13, 1981)

**JUDGMENT ON THE REPORT AND FINDINGS
OF THE CONDEMNATION COMMISSION**

ON THE 6th day of March, 1979, came on for hearing before a commission appointed by the Court the issue of just compensation for the condemnation of the estate in and to Tract No. 189-09, 189-15, 189-18, 190-02, 190-05, 191-02 and 191-05, as said estate and tracts are described in the Complaint in Condemnation filed in this cause. The Report and Findings of the Condemnation Commission was filed on March 3, 1980, awarding just compensation, and the Court after considering said Report, accepts the findings of the fact incorporated in said Report and Findings of the Condemnation Commission

in the above-entitled civil action, and it appearing to the Court that such Report should be approved, in that such findings of fact were supported by substantial evidence, and there was no substantial error or misapplication of controlling law in the proceedings of the Commissioners, accordingly, it is ORDERED that the findings of fact incorporated in such Report be and they are hereby adopted and it is further ORDERED that the Report and Findings of the Condemnation Commission be and it is hereby ACCEPTED and APPROVED by this Court. The Court being fully advised in the premises, further finds:

The said Complaint was duly filed and that all proper process and notice required by law were given the said owners named as Defendants herein:

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED by the Court:

1. That the just compensation for the condemnation of the estate in and to Tract Nos. 189-09, 189-15, 189-18, 190-02, 190-05, 191-02 and 191-05 as said estate is described in the Complaint in Condemnation on file herein is \$2,331,202.00 plus interest at the rate of six per cent (6%) per annum from August 21, 1978, to the date of deposit.

2. That the United States shall deposit into the Registry of the Court the sum of \$2,331,202.00 together with interest at the rate of six per cent (6%) per annum from August 21, 1978, to the date of said deposit.

SIGNED and ENTERED this the 12th day of August,
1981.

/s/ ROBERT M. PARKER
United States District Judge

Consented to as to form only:

/s/ JOYCE COX
Joyce Cox
Attorney for the Defendant

/s/ HARRY W McKEE
Harry W. McKee
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION B-78-598-CA-MF-1525-54

TRACT NOS.: 189-09, 189-15, 189-18,
190-02, 190-05, 191-02, 191-05

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UNITED STATES OF AMERICA, Plaintiff,

v.

2,175.86 ACRES OF LAND, MORE OR LESS,
SITUATE IN HARDIN AND JEFFERSON
COUNTIES, TEXAS, AND KIRBY FOREST
INDUSTRIES, INC., AND UNKNOWN OWNERS,
Defendants.

(Filed March 30, 1982)

JUDGMENT

ON THIS DAY came on to be considered the deposit of funds by plaintiff as previously ordered and the Application for Distribution of Funds as to Tract No. 189-09, 189-15, 189-18, 190-02, 190-05, 191-02, and 191-05, and the Court being fully advised in the premises, finds:

That the proceedings have been conducted according to law;

That this Court has jurisdiction of the parties and subject matter;

That plaintiff has deposited funds in the amount of \$2,835,508.06 as ordered by Judgment on Report and Findings of the Condemnation Commission.

It is, therefore, ORDERED, ADJUDGED, and DECREED by the Court:

1. That the Clerk will issue his check, payable to Kirby Forest Industries, Inc., in the amount of \$2,825,-508.06, and deliver to Curtis Willie, Director of Administration, Kirby Forest Industries, Inc.

2. That the sum of \$10,000.00, representing escrow funds for disputed taxes claimed to be payable to Jefferson County Tax Collector, City of Beaumont Tax Collector, Beaumont Independent School District Tax Collector, Hardin County Tax Collector, and Lumberton Independent School District Tax Collector, shall remain on deposit in the registry of the court.

3. The payments herein ordered are subject to adjustment as may be ordered pursuant to appeals now pending in the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, and all action by Courts with jurisdiction in future related proceedings; and any overpayment or underpayment as determined in said proceedings shall be taken into the final accounting in this cause.

4. That all defendants named in this action as to the above mentioned tracts, except the persons named above, take nothing by reason of this suit.

5. That title in and to the estate condemned in this proceeding is vested in the United States of America.

SIGNED and ENTERED this the 30th day of March,
1982.

/s/ **ROBERT M. PARKER**
United States District Judge

APPROVED AS TO FORM ONLY:

/s/ **JOYCE COX**
Joyce Cox
Attorney for Kirby Forest Industries, Inc.

/s/ **HARRY W. McKEE**
Harry W. McKee
Attorney for United States of America

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

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**TRACT NOS.: 189-09, 189-15, 189-18,
190-02, 190-05, 191-02, 191-05**

(Big Thicket National Preserve)

UNITED STATES OF AMERICA, Plaintiff,

v.

**2,175.86 ACRES OF LAND, MORE OR LESS,
SITUATE IN HARDIN AND JEFFERSON
COUNTIES, TEXAS, AND KIRBY FOREST
INDUSTRIES, INC., AND UNKNOWN OWNERS,
Defendants.**

(Filed March 26, 1982)

CERTIFICATE OF CLERK

I, Murray L. Harris, Clerk of the United States District Court, Eastern District of Texas, do hereby certify that on the 26th day of March, 1982, I received from the United States of America, Plaintiff herein, and deposited in the Registry of the Court the sum of \$2,835,508.06, represented by U. S. Treasury Check Nos. 178,726, 178,727, and 178,728 dated March 26, 1982 to the credit of the above numbered tracts.

THIS the 26th day of March, 1982.

MURRAY L. HARRIS, Clerk
United States District Court

By: /s/ FRANCES CHATMAN
Deputy

(Affix Seal)

Civil No. B-78-598-CA-MF-1525-54

Tract No. 189-09

Tract No. 189-15

Tract No. 189-18

Tract No. 190-02

Tract No. 190-05

Tract No. 191-02

Tract No. 191-05 . . . \$2,835,508.06